adopted what is known as the English view. According to this doctrine, where an executory written contract for the sale of such an interest in land as comes within the statute of frauds does not contain all the terms required by the statute, even though the terms were omitted through mistake, equity has no power to establish these terms by parol testimony and decree specific performance of the contract as reformed.[12] The courts that adhere to this view contend that the very basis of the theory upon which parol evidence is admissible to show a mistake and to establish terms other than those contained in the writing, is that the writing does not evidence the entire contract but only a part of it.[13] Consequently when a term is established by parol evidence, it is not thereby raised to the dignity of a written term, but becomes merely a parol element of a composite contract.[14] Inasmuch as the contract as reformed is partly oral and partly written, and all remedy is taken away on an oral executory contract that comes within the purview of the statute of frauds, such a contract cannot be enforced.[15] The purpose of the statute is to avoid fraud arising from perjury, uncertain recollection, and mistaken understandings, which are peculiarly incident to oral contracts, and to enforce a contract, some of the terms of which must be established by parol, would serve to defeat this object.[16] But even under this holding, parol evidence will be received of course to establish the mistake for the purpose of rescinding the contract; and in addition to such rescission, the plaintiff will be allowed to recover anything which he has parted with to the defendant because of the contract.[17]

In the recent case of *Vogt et al.* v. *Mullin* (N. J.), 89 Atl. 533, there was a failure through mutual mistake to mention in a written executory contract for the sale of land the fact that it was subject to a right of way. The contract contained an express agreement that the vendor would convey the land free from all encumbrances. It was held that equity would not reform the contract and then decree its specific performance against the vendee.

WAIVER OF FORFEITURE BY FIRE INSURANCE COMPANIES.—Probably no topic of insurance law is subject to greater diversity of opinion and authority than is the doctrine of election of grounds

[12] Woolam *v.* Hearn, 7 Ves. Jr. 211; Glass *v.* Hulbert, *supra;* Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810; Macomber *v.* Peckham, 16 R. I. 485, 17 Atl. 910; Safe Deposit Co. *v.* Diamond, etc., Co. (Pa.), 83 Atl. 54; Baume *v.* Morse, 13 Cal. App. 456, 110 Pac. 350; Wirtz *v.* Guthrie, 81 N. J. Eq. 271, 87 Atl. 134.

[13] GREENLEAF, EVIDENCE, 16 ed., § 284a; 3 JONES, COMMENTARIES ON EVIDENCE, § 437.

[14] Woolam *v.* Hearn, *supra;* Safe Deposit Co. *v.* Diamond, etc., Co., *supra;* Davis *v.* Ely, *supra.*

[15] Macomber *v.* Packham, *supra;* Wirtz *v.* Guthrie, *supra.*

[16] Macomber *v.* Peckham, *supra.*

[17] Glass *v.* Hulbert, *supra.*

of non-payment and implied waiver of forfeiture by fire insurance companies. Perhaps the departure from the general principles of contract, waiver, and estoppel, in the cases holding that the assertion of a forfeiture upon one ground is a waiver of other grounds, is traceable to *dicta* [1] quoted with approval in the principal case. [2] According to these *dicta* insurance companies may refuse to pay without specifying any ground, and insist upon any available ground, but if they assert a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, even though no grounds of estoppel exist. The confusion among the authorities seems to have been accelerated by a few Michigan cases [3] and to *dicta* in several imperfectly assimilated cases [4] in New York previous to the great case of *Armstrong* v. *Insurance Co.*,[5] in 1892, virtually overruling the then leading case of *Titus* v. *Insurance Co.*[6]

The text-writers are agreed that, on reason and principle, statements to the assured after loss certain reasons or grounds for refusing payment constitute in general no waiver of other grounds of forfeiture, nor will the company be thereby estopped when it subsequently comes to litigation from setting up any other defense it may have.[7] But the same authors are disagreed as to the weight of authority.[8]

The view that the mere gratuitous assignment of reasons without the presence of grounds of estoppel constitutes a waiver of other grounds known to the insurer was upheld in the recent case of *Ward* v. *Queen City Fire Insurance Company* (Ore.), 138 Pac. 1067. The insured after the loss by fire disclosed the circumstances of the fire and later submitted by way of proofs of loss sworn statements. The insurer declined to pay on the ground of breach of condition as to keeping gasoline on the premises. The insured instituted his action and the insurer defended on the grounds of incendiary origin, false swearing in proofs of loss, and concurrent insurance. It was held that the insurer had waived all grounds of forfeiture except the specific ground named in the declination of payment of loss; that grounds of equitable estoppel are not necessary to constitute a waiver. By other cases the insurers are not allowed to assert a defense inconsistent with the specific defense previously claimed.[9] A few early New York cases are the main

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[1] Brink *v.* Hanover Fire Ins. Co., 80 N. Y. 108.

[2] *Infra.*

[3] Carpenter *v.* Ins. Co., 61 Mich. 635, 28 N. W. 749; Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236.

[4] Goodwin *v.* Ins. Co., 73 N. Y. 480; Prentice *v.* Ins. Co., 77 N. Y. 483; Brink *v.* Ins. Co., *supra.*

[5] 130 N. Y. 560, 29 N. E. 991.

[6] 81 N. Y. 410.

[7] RICHARDS, INSURANCE, 3 ed., 185; 3 COOLEY, INSURANCE, 2736; VANCE, INSURANCE, 376-380.

[8] *Pro,* RICHARDS; *contra,* VANCE and COOLEY; also *contra,* 19 CYC. 793.

[9] Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 15 N. W. 452; Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650.

support of the doctrine of implied waiver of forfeiture by the voluntary assignment of other grounds.[10]

The better view of the doctrine of implied waiver of forfeiture, that a voluntary assignment of reasons with no elements of equitable estoppel is inoperative as a waiver, is upheld by the great case of *Armstrong* v. *Insurance Co.*[11] A mortgagee in ignorance of a provision in a fire policy for forfeiture if foreclosure proceedings were instituted without the consent of the insurer, brought suit on the mortgage, but on discovery of the clause asked permission by letter to continue the suit. The company did not reply and after foreclosure the premises were destroyed. The assured declined to furnish proofs but upon the mortgagee's furnishing them, the company wrote that it declined " to accept or receive such papers as a proof of loss under said policy upon the ground that they are not executed by the assured mentioned in the policy, as required by the conditions of the policy." It was held that the denial upon the specific ground of proofs not furnished by the assured, the other ground of forfeiture (beginning of foreclosure proceedings without consent) being at the time within the insurer's knowledge, did not preclude the company from defending on the ground not specifically stated in the declination of payment.

In a later case[12] the New York court vacillated and showed a disposition to depart from the earlier case but in the latest case[13] the court reviews all of the preceding cases and adopts the view that a waiver cannot be valid unless supported by elements of estoppel. In the absence of an express waiver, at least some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could be done only by virtue of the policy, or have required something of the assured which he was bound to do under a valid policy, or have exercised a right which it had only by virtue of such policy.

It is difficult to see why a gratuitous assignment of reasons, and furthermore often a matter of lay opinion and no conscious election of grounds at all, made before the institution of the action, should compel the insurer "to ever afterwards hold his peace," when it is admitted by the authorities that no waiver would exist if no grounds were given or were refused to be stated. Usually the claimant is more completely informed about the facts of the fire and loss than the insurer ever hopes to be, and presuming the insured has a just claim, with the favoritism shown the insured by the courts, no surprise can be occasioned by the insurer pleading other matters in defense. The insurer may know of a technical ground of forfeiture but yet receive proofs of loss required under the

[10] Titus *v.* Ins. Co., *supra;* Roby *v.* Ins. Co., 120 N. Y. 510.
[11] *Supra.*
[12] Kiernan *v.* Ins. Co., 150 N. Y. 190, 44 N. E. 698.
[13] Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., 159 N. Y. 418, 54 N. E. 23.

standard policy because the insurance company, in this age of keen competition among the companies and precise exactions of the public as the prospective insured, decides it politic to pay the claim if a just one. The insured performs the acts because he has so contracted and not because he has been induced to do so by the insurer.[14] The insured cannot justly claim that he has been misled by a mere demand for strict compliance with the policy. Hence it seems contrary to reason when the two leading cases [15] for the doctrine of implied waiver of other grounds by the assignment of any ground of forfeiture, hold that the allowance of the insured to incur the expense of collating proofs of loss required by the contract incorporated in the policy as a condition precedent of recovery, is an implied waiver of forfeiture on any other ground.

As a general rule, the unsound view is based on a departure from the general principles of waiver and estoppel. "The terms 'waiver' and 'estoppel' are ordinarily used both by the courts and text-writers as synonymous in the law of insurance." [16] The difference in meaning turns mainly on the point of view: the insurer may waive a forfeiture and thereby as to the insured be estopped to assert it. The better cases with reference to implied waiver of forfeiture advance the doctrine that a waiver to be efficacious must embrace the elements present in an equitable estoppel.[17] But the court in the principal case dismissed without consideration the authority relied on by insurer's counsel, saying merely, "We *feel* that both the force of logic and weight of authority sustain the doctrine just announced," and cited no other authority than "19 Cyc. 793." In the cases frequently cited by the courts for the proposition that the waiver of forfeiture by insurance companies need not be based upon a technical estoppel [18] there are *dicta* to that effect, but the elements of estoppel are recognized to exist in the facts of the cases, where there has been no express waiver. In these cases the insured were misled by acts of the insurers, causing them to omit the furnishing of proofs of loss, and the insurers defended on the ground of failure to furnish proof of loss. Clearer cases of estoppel are hardly procurable.

The conclusion is justified that by the weight of authority as well as on reason and principle the assignment of reasons for refusing payment is not a waiver of other grounds of forfeiture and the insurer will not be estopped to bring forward other defenses when an action is instituted by the insured on the policy. To constitute a waiver grounds of equitable estoppel must exist.

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[14] Wheaton *v.* Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Johnson *v.* Am. Ins. Co., 41 Minn. 396, 43 N. W. 59.

[15] Titus *v.* Ins. Co., *supra;* Roby *v.* Ins. Co., *supra.*

[16] VANCE, INSURANCE, 343.

[17] Armstrong *v.* Agricultural Ins. Co., *supra;* Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., *supra.*

[18] Goodwin *v.* Ins. Co., *supra;* Prentice *v.* Ins. Co., *supra;* Brink *v.* Ins. Co., *supra.*